

22 Filed  
10/11/06

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF MICHIGAN

Westside Mothers, Families on the Move, Inc.,  
Michigan Chapter, American Academy of  
Pediatrics, Michigan Chapter, American  
Academy of Pediatric Dentists, and  
Ky. L., by his next friend Patricia L.,  
Ka. L., by her next friend Patricia L.,  
K. C., by her next friend Zina C.,  
S. J., by her next friend Nicole J.,  
M. J., by her next friend Nicole J.,  
Dh. W., by her next friend Dawn W.,  
El. W., by her next friend Dawn W.,  
Em. W., by her next friend Dawn W.,  
Dl. W., by his next friend Dawn W.,  
Ja. E., by her next friend Deana H.,  
Je. E., by her next friend Deana H.,  
M. L., by her next friend Deana H.,  
J. C., by his next friend, Monica C.,

Plaintiffs,

v.

Janet Olszewski, In Her Official Capacity as  
Director of the State of Michigan  
Department of Community Health,  
Lewis Cass Building, 6<sup>th</sup> Floor  
320 South Walnut Street, Lansing MI 48933;  
Paul Reinhart, In His Official Capacity as  
Deputy Director of the State of Michigan Medical  
Services Administration,  
400 South Pine, Lansing MI 48933,

Defendants.

CIVIL ACTION

CASE NO.: 99-CV-73442-DT

CLASS ACTION

SECOND AMENDED COMPLAINT

Marilyn P. Mullane 30998  
MICHIGAN LEGAL SERVICES  
900 Michigan Building  
220 Bagley Street  
Detroit, MI 48226  
(313) 964-4130

Susan McParland  
MICHIGAN ASSOCIATION  
FOR CHILDREN WITH  
EMOTIONAL DISORDERS  
30233 Southfield Road, Suite 219  
Southfield, MI 48076  
(248) 433-2200

Jennifer R. Clarke  
PUBLIC INTEREST  
LAW CENTER  
OF PHILADELPHIA  
125 South 9<sup>th</sup> Street, Suite 700  
Philadelphia, PA 19107  
(215) 627-7100

Richard L. Berkman  
DECHERT LLP  
Cira Centre  
2929 Arch Street  
Philadelphia, PA 19104-2808  
(215) 994-2684

*Of Counsel:*

Jane Perkins  
NATIONAL HEALTH LAW  
PROGRAM  
211 N. Columbia Street  
Chapel Hill, NC  
(919) 968-6308

Attorneys for Plaintiffs



## I. INTRODUCTION

1. This is a civil rights class action against Michigan state officials arising out of their failure to provide eligible children in Michigan with "Medical Assistance," as that term is defined in 42 U.S.C. § 1396d(a), and their failure to comply with 42 U.S.C. § 1396a(a)(8), (a)(10) and (a)(43)(A), (B) and (C). This case is brought on behalf of the more than 950,000 children throughout Michigan who depend on Medicaid for essential medical and dental services (referred to as Early and Periodic Screening, Diagnostic, and Treatment Services, or "EPSDT"), as required by federal law. The named Plaintiffs, on behalf of these children, seek injunctive relief and appointment of a Special Master to stop the systemic violation of federal laws currently taking place in Michigan, which is causing these children to be deprived of these required services. These violations result in deprivation of medically necessary care, which in turn results in the needless infliction of pain, the endangerment of young lives, the disruption of learning, development and growth and the stunting of children's chances to achieve their full potential.

## II. JURISDICTION AND VENUE

2. Plaintiffs bring this action to redress the deprivation of rights secured them under 42 U.S.C. § 1396a(a)(8), (a)(10) and (a)(43)(A), (B) and (C), as defined by 42 U.S.C. §§ 1396d(a) and (r) and 1396u-2(b)(5), and which are enforceable under 42 U.S.C. § 1983.

3. This Court has subject matter jurisdiction under 28 U.S.C. § 1331, which confers on the federal district courts original jurisdiction over all civil suits arising under the Constitution and laws of the United States, and 28 U.S.C. § 1343(a)(3) and (4), which confers on the federal

district courts original jurisdiction over all claims asserted under 42 U.S.C. § 1983 to redress any deprivation under color of state law of rights, privileges, and immunities guaranteed by the Constitution of the United States or the acts of Congress.

4. Plaintiffs' request for declaratory and injunctive relief, and for other appropriate equitable relief, is authorized by 28 U.S.C. §§ 2201-02, 42 U.S.C. § 1983, and FED. R. CIV. P. 57 and 65.

5. Venue is proper in the Eastern District of Michigan under 28 U.S.C. § 1391(b).

### III. PARTIES

#### A. Plaintiffs

6. Plaintiff Ky. L. is a twelve year old boy with autism and Plaintiff Ka. L. is his thirteen year old sister. They both live with their mother Patricia L. in Westland, Michigan. Approximately two years ago, Patricia L., on behalf of Ky. L. and Ka. L., applied for and enrolled in Medicaid. By applying for and enrolling in Medicaid, Patricia L. requested the right for her children Ky. L. and Ka. L. to receive EPSDT services. During this time, Ky. L. and Ka. L. have been unable to obtain a single dental screening, though the American Academy of Pediatric Dentistry recommends screenings every six months for children twelve and thirteen years old and Michigan has adopted that schedule as part of its State Plan. During the first 15 months Ky. L. and Ka. L. were Medicaid beneficiaries, the Defendants failed to inform Patricia L. that Medicaid covered dental screenings. In approximately February 2006, Patricia L. discovered that Defendants do pay for dental screenings and other dental services. The dentist Ky. L. and Ka. L. had been seeing routinely for the years before they were enrolled in Medicaid,

however, did not accept Medicaid. Patricia L. called a helpline established by Defendants to request dental services and to locate Medicaid providers, but Defendants' representative told her that Defendants could not help her find a new dentist; she had to find a new dentist on her own. Patricia L. next called a free hotline providing information about available dentists (1-800-DENTIST) to find a dentist who accepted Medicaid for Ky. L. and Ka. L. The representative informed Patricia L. that it did not have any record of a dentist in her area accepting Medicaid. Patricia L. then called every dentist in her local phone book, but all of them either did not accept Medicaid or were not accepting new Medicaid patients. In addition to being unable to find a dentist for her two children, Patricia L. has had difficulty finding providers of various other EPSDT services for Ky. L. that are required because he is autistic. For example, it took one and a half years for Patricia L. to get Ky. L. speech services, about one year to get Ky. L. psychological services, all because she could not find providers in her area that both accepted Medicaid and were accepting new Medicaid patients.

7. Plaintiff K. C. is a thirteen month old girl who is living with her mother Zina C. in Detroit, Michigan. Zina C. is a member of Plaintiff Westside Mothers. K. C. has been a Medicaid beneficiary since she was born. By applying for and enrolling in Medicaid, Zina C. requested the right for her child K. C. to receive EPSDT services. K. C. was born with talipes equinovarus deformity (clubfoot) of the right foot. When Zina C. and K. C. were discharged from the hospital after K. C.'s birth, the hospital directed Zina C. to follow-up with an orthopedic surgeon in approximately one week. Zina C. requested orthopedic services from the orthopedic surgeon to which she was referred, but this orthopedic surgeon did not accept Medicaid. Zina C.

indicated a blood lead level of 12, for which she received no further treatment. She has not been retested since the last examination. Deana H. and Ja. E. have never received information about the need for further follow-up testing from Defendants, nor have they received scheduling assistance for such follow-up testing from Defendants. As a consequence of the lead poisoning, Plaintiff Ja. E. is struggling in school in the second grade, after she failed first grade twice. She is hyperactive and extremely forgetful. She requires a lot of help with school work, but is not receiving any special education assistance. Plaintiff Ja. E. also suffers from labored breathing. She has never been tested for asthma. Finally, Ja. E. has received only one hearing and vision screening examination, and that was almost five years ago. Again, Ja. E. received these screening examinations only because Head Start required them prior to enrollment in the program. Deana H. and Ja. E. have never received information from Defendants about the EPSDT Ja. E. is entitled to receive. Deana H. and Ja. E. did not know that Ja. E. should have received a lead blood test before she was four years old and did not know that Ja. E. should be receiving regular hearing and vision screening examinations. Deana H. would have requested lead blood, hearing and vision screening examinations and treatment for Ja. E.'s asthma (among other EPSDT services) explicitly had she been informed that federal law requires Defendants to pay for them.

12. Plaintiff Je. E. is the sister of Plaintiff Ja. E., is seven years old and also resides with her mother, Deana H., in Detroit, Michigan where she has lived since birth. Je. E. has been enrolled in Medicaid for her entire life and obtains care currently through the HMO, Omnicare. By applying for and enrolling in Medicaid, Deana H. requested the right for her child Je. E. to receive EPSDT services. Like her sister, Je. E. has never received EPSDT, other than the check-

up which occurred as a condition for her admission to the Head Start program. Deana H. and Je. E. have never received information from Defendants about the EPSDT Je. E. is entitled to receive. Deana H. and Je. E. did not know that Je. E. should receive regular and periodic screening examinations, including lead blood testing and vision and hearing examinations. Deana H. would have requested EPSDT explicitly had she been informed that federal law requires Defendants to pay for such services.

13. Plaintiff M. L. is 2 years old and the sister of Plaintiffs Ja. E. and Je. E. and also resides with her mother, Deana H., in Detroit, Michigan where she has lived since birth. M. L. has been enrolled in Medicaid for her entire life and obtains care currently through the HMO, Omnicare. By applying for and enrolling in Medicaid, Deana H. requested the right for her child M. L. to receive EPSDT services. M.L. has had only 3 check-ups since birth, even though the American Academy of Pediatrics recommends that every child between the ages of one month old and three years old should receive approximately ten periodic check-ups and Michigan has adopted that schedule as part of its State Plan. M. L. has not received all the necessary immunizations. Because the HMO has not scheduled appointments for immunizations for M. L., Deana H is planning to take M. L. to a clinic for free immunizations. Deana H. and M. L. have never received information from Defendants about the EPSDT M. L. is entitled to receive. Deana H. and M. L. also have not received information from Defendants regarding the need for age-appropriate immunizations against vaccine-preventable diseases. Deana H. and M. L. did not know that M. L. should receive immunizations. Deana H. would have requested immunizations explicitly had she been informed that federal law requires Defendants to pay for such services.



14. Plaintiff J. C. is thirteen years old and resides with his mother, Monica C. in Detroit, Michigan where he has lived since birth. He suffers from asthma, apparent psychiatric or neurological problems and is learning disabled. He has been enrolled in Medicaid his entire life and obtains care currently through the HMO, Midwest. By applying for and enrolling in Medicaid, Monica C. requested the right for her child J. C. to receive EPSDT services. He is in a special education program at his school and performing at the level of a seven year old. As a result of his behavior at school, J. C.'s special education teacher advised that he should be neurologically and psychologically tested. Monica C. took J. C. to his health care provider and sought a referral to a neurologist or psychiatrist, which was denied. J. C. continues to exhibit bizarre behavior, including conversations with imaginary persons, for which he is not being treated. Teachers at the Emerson School, which J. C. has been attending for the past year, suspect that J. C. may suffer from attention deficit hyperactivity disorder and recently recommended that he be tested for this problem. Monica C. is waiting for a referral. Monica C. and J. C. have never received information from Defendants about the EPSDT J. C. is entitled to receive. Also, as noted above, Monica C. requested screening examinations explicitly.

15. Plaintiff Michigan Chapter, American Academy of Pediatrics ("AAP") is a not-for-profit organization with more than 1500 member pediatricians in Michigan. Members of the AAP provide healthcare to children eligible for and/or enrolled in Medicaid. The mission of the AAP is to attain "optimal physical, mental, and social health for all infants, children, adolescents and young adults." The AAP dedicates its resources and efforts to protecting the medical needs of children. In particular, the AAP focuses on promoting policies that increase access to healthcare for low-income children. Thus, the AAP seeks to assure that children who are

Medicaid beneficiaries receive medical and dental services. AAP brings this complaint on behalf of itself, its members and the patients of its members. The unlawful acts and omissions of Defendants have imposed otherwise unnecessary expenditures of organizational resources upon the AAP. The unlawful acts and omissions of Defendants also have resulted in payments to AAP members that are not sufficient to cover the cost of treating Medicaid beneficiaries. Consequently, the patients of the members of the AAP are deprived of Medical Assistance required by § 1396a(a)(8) and (a)(10) and other services required by § 1396a(a)(43)(A), (B) and (C) by the Defendants' unlawful acts and omissions.

16. Plaintiff Michigan Chapter, American Academy of Pediatric Dentists ("AAPD") is a not-for-profit organization with more than 100 member pediatric dentists in Michigan. Members of AAPD provide dental care to children eligible for and/or enrolled in Medicaid. The mission of the AAPD is to improve and maintain the oral health of infants, children, adolescents, and persons with special needs. The AAPD is dedicated to promoting policies that increase access to oral healthcare for low-income children. Thus, the AAPD seeks to assure that children who are Medicaid beneficiaries receive periodic and comprehensive dental examinations and treatment. The AAPD brings this case on behalf of itself, its members and the patients of its members. The unlawful acts and omissions of Defendants have imposed otherwise unnecessary expenditures of organizational resources upon the AAPD. The unlawful acts and omissions of Defendants also have resulted in payments to AAPD members that are not sufficient to cover the cost of treating Medicaid beneficiaries. Consequently, the patients of the members of the AAPD are deprived of Medical Assistance required by § 1396a(a)(8) and (a)(10) and other services required by § 1396a(a)(43)(A), (B) and (C) by the Defendants' unlawful acts and omissions.

17. Plaintiff Families On the Move, Inc. ("FOM") is a Michigan non-profit corporation. FOM is a membership organization composed of foster parents, adoptive parents, and biological parents of special needs children. The organization is based in Wayne County, Michigan, with members throughout the State. The group was organized to provide support and information, and to advocate on behalf of families with children with special needs. Well over half of the members are foster families in the process of adopting their foster children. These children are special needs children who suffer from a variety of illnesses and disabilities and who require ongoing medical care for their conditions. All of the foster care and adoptive children are eligible for and/or enrolled in Medicaid. An overwhelming number of these children have a history of grossly inadequate medical care. The foster care children have multiple special needs and are frequently from abusive homes. Foster care parents are expected to ensure adequate healthcare for their children. Foster care parents are required by law to ensure that their foster children are immunized. These parents face obstacles, however, including lack of complete records, a history of inadequate healthcare, Defendants' failure to provide Medical Assistance, and Defendants' failure to adequately monitor the actions (and inaction) of the managed care organizations with whom Defendants contract to manage the Medicaid program and coordinate the care of Medicaid beneficiaries. FOM brings this case on behalf of itself, its members and the foster care and/or adoptive children of its members. The unlawful acts and omissions of Defendants have imposed otherwise unnecessary expenditures of organizational resources upon FOM. The unlawful acts and omissions of Defendants also result in the foster care and/or adoptive children of FOM's members not receiving the Medical Assistance required by

§ 1396a(a)(8) and (a)(10) and other services required by § 1396a(a)(43)(A), (B) and (C) to which they are entitled.

18. Plaintiff Westside Mothers is a Michigan non-profit corporation. Westside Mothers is a welfare rights organization with more than 600 members living primarily on Detroit's Westside, the majority of whom are mothers and their children eligible for and/or enrolled in the Medicaid program and who need the Medical Assistance and other services required by the Social Security Act. Westside Mothers brings this case on behalf of itself and its members. The unlawful acts and omissions of Defendants have imposed otherwise unnecessary expenditures of organizational resources upon Westside Mothers. The unlawful acts and omissions of Defendants also result in members of Westside Mothers not receiving the Medical Assistance required by § 1396a(a)(8) and (a)(10) and other services required by § 1396a(a)(43)(A), (B) and (C) to which they are entitled.

B. Defendants

19. Defendant Janet Olszewski is the Director of the Michigan Department of Community Health (DCH), which has been designated by the Governor of Michigan as the single state Medicaid agency. As such, Defendant Olszewski has the ultimate, non-delegable duty to assure that Michigan's Medicaid program is implemented and administered consistent with the requirements of the Social Security Act. Defendant Olszewski is sued in her official capacity.

20. Defendant Paul Reinhart is the Deputy Director of the Medical Services Administration, which is the state Medicaid agency. As such, he is responsible for heading the

agency that provides healthcare coverage for the Michigan residents who are eligible for Medicaid. Defendant Reinhart is sued in his official capacity.

#### IV. CLASS ACTION ALLEGATIONS

21. The named Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to FED. R. CIV. P. 23(a) and (b)(2). Plaintiffs' class (the "Class") consists of children under the age of 21 who are now, or will in the future be, residing in Michigan and who are, or will be, eligible for and/or enrolled in Medicaid and who have been, or will be, deprived of Medical Assistance for EPSDT under 42 U.S.C. § 1396a(a)(8) and (a)(10) and/or other services to which they are entitled under 42 U.S.C. § 1396a(a)(43)(A), (B) and (C).

22. The requirements of FED. R. CIV. P. 23(a) are met in that the Class is so numerous that joining all members is impractical. According to the most current official reports of the Michigan Medicaid program, 958,135 children under age 21 were eligible for and/or enrolled in Medicaid in fiscal year 2003.

23. The named Plaintiffs raise claims based on questions of law and fact that are common to the Class. Plaintiffs and the Class members all rely on Defendants to ensure that they (a) have access to and receive Medical Assistance for medical and dental services guaranteed them under federal law, and (b) receive other services guaranteed them under federal law. Additionally, Plaintiffs and the Class members all experience the same harm: they are being deprived of, or are at risk of being deprived of, Medical Assistance and other services to which they are entitled under federal law because of systemic deficiencies and barriers in Michigan's Medicaid program, for which Defendants are responsible. Questions of fact and law

common to the entire Class include whether Defendants fail to meet their obligations under 42 U.S.C. § 1396a(a)(8), (a)(10), (a)(43)(A), (a)(43)(B), and (a)(43)(C), as defined by 42 U.S.C. § 1396d(a) and (r) and 1396u-2(b)(5).

24. The claims of the named Plaintiffs are typical of the Class in that neither the named Plaintiffs nor the members of the Class have been provided: (a) Medical Assistance for the medical and dental services required by federal law; (b) requested screening services; (c) corrective treatment for conditions discovered during requested screening services; (d) required information regarding the availability of EPSDT; and, (e) required information regarding the need for age-appropriate immunizations against vaccine-preventable diseases.

25. The named Plaintiffs will fairly and adequately protect the interests of the Class. They are represented by attorneys employed by Michigan Legal Services, Dechert LLP, the Public Interest Law Center of Philadelphia, the National Health Law Program and the Michigan Association for Children with Emotional Disorders. Counsel have experience in complex class action litigation involving healthcare and civil rights laws. Counsel have the resources, expertise, and experience to prosecute this action. Furthermore, there is no antagonism and no conflict exists between the named and unnamed Class members because all Plaintiffs seek the same relief: a system that adequately provides Medical Assistance for the full range of EPSDT children's healthcare services to which Plaintiffs are entitled under federal law.

26. The requirements of FED. R. CIV. P. 23(b)(2) are met because Defendants' acts and omissions have affected and will affect the Class generally, in that the case arises from Defendants' systemic failure to provide the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs with Medical Assistance for medical

and dental services, as well as other services required by federal law, and the Class seeks appropriate final injunctive and declaratory relief with respect to the Class as a whole.

#### IV. FACTUAL ALLEGATIONS

27. Title XIX, the Medicaid title of the Social Security Act (the "Act") provides for "Medical Assistance" and other services to individuals who lack the financial means to obtain needed healthcare on their own. Medicaid is partially administered by the federal government, under the aegis of the Centers for Medicare and Medicaid Services ("CMS"). Each state can decide whether to participate in the Medicaid program, and all states do. The state and federal governments share responsibility for funding Medicaid. In Michigan during fiscal year 2005 (October 1, 2004-September 30, 2005), the federal government paid approximately 57 % of all Medicaid service costs and the State paid the remaining 43 % of the service costs. States administer the program, subject to federal requirements imposed by the Act, Medicaid regulations, 42 C.F.R. §§ 440.40(b), 441.50 et seq., and CMS policy directives, such as the State Medicaid Manual.

28. In 1967, Congress amended the Act to add a requirement that children receive Medicaid for healthcare services. Through this Amendment, Congress intended to establish a unified, accessible, and accountable system of children's healthcare that would ensure that eligible children actually had the opportunity to receive medical and dental examinations and treatment necessary for healthy development. Congress has since amended the Act a number of times to strengthen and elaborate upon this requirement

29. Michigan has participated in Medicaid since 1965. Federal law requires a state's Medicaid program to cover certain groups of children, 42 U.S.C. § 1396a(a)(1), and allows states to include certain optional groups of children. *Id.* Whether included as a mandatory or an optional group, the state's implementation of the Medicaid program must adhere to the requirements of federal law, including the requirements to provide Medical Assistance for EPSDT and provide other children's healthcare services. 42 U.S.C. § 1396a. Currently, Michigan covers infants (under age one) with family incomes at or below 185% of the federal poverty level. The State has chosen to provide Medicaid eligibility up to 150% of the federal poverty level for children ages 1 through 18. More than 950,000 Michigan children have enrolled in Medicaid—approximately 30% of all children in the State. CMS, Form 416 (FY 2002); CMS, Form 2082 (FY 1999); Children's Defense Fund (1997).

30. Until 1997, Michigan operated its Medicaid program much like a commercial fee-for-service insurance plan. In 1997, Michigan applied for and obtained a waiver from the Secretary of Health and Human Services to allow the state to begin replacing its traditional Medicaid program with a "managed care" program. 42 U.S.C. § 1396n(b). This waiver has been renewed. The current version, which is set to expire on June 30, 2007, requires the State to demonstrate that its Medicaid managed care program still assures that beneficiaries receive access to care and quality services.

31. By contracting with managed care organizations ("MCOs"), Defendants do not relieve themselves of the responsibility of complying with the requirement to provide Medical Assistance and other children's healthcare services. At all times, the duty to ensure that all federally mandated services are provided remains with Defendants and cannot be delegated or



assigned. Defendants also must monitor and evaluate the MCOs' performance and determine whether they are adequately providing the care they are obligated to provide. 42 U.S.C. § 1396u-2(c); see also 42 U.S.C. § 1396u-2(b)(5).

32. Since the late 1980s, and particularly since 1997, the numbers of Medicaid beneficiaries in Michigan enrolled in managed care plans has increased. As of June 30, 2003, 99.44% of Michigan's Medicaid beneficiaries were enrolled in managed care plans. CMS, Medicaid Managed Care Penetration Rates by State (last modified June 30, 2003) <<http://www.cms.hhs.gov/medicaid/managedcare/mcsten03.htm>>. The vast majority of Medicaid beneficiaries under age 21 are enrolled in Michigan's managed care program.

33. The Act requires that Medical Assistance "shall be furnished" to "all eligible individuals." 42 U.S.C. § 1396a(a)(8); see also 42 U.S.C. § 1396a(a)(10)(A) (setting forth what individuals are eligible to receive Medical Assistance).

34. The Act defines "Medical Assistance" to mean "payment of part or all of the cost of [certain] care and services" for eligible individuals. 42 U.S.C. § 1396d(a).

35. The Act also provides that the State must provide Medical Assistance for at least a minimum set of services, which include Early and Periodic Screening, Diagnostic and Treatment Services. 42 U.S.C. § 1396a(a)(10); see also 42 U.S.C. § 1396d(a)(4)(B).

36. The Act defines "Early and Periodic Screening, Diagnostic and Treatment Services" ("EPSDT") to include regular medical and dental examinations in accordance with a schedule set in consultation with recognized medical and dental organizations. The medical examination must include a comprehensive health and developmental history (including an assessment of physical and mental health development), a comprehensive unclothed physical

examination, appropriate immunizations, laboratory tests (including lead blood tests), health education, and anticipatory guidance. The medical examination also must include vision and hearing examinations. 42 U.S.C. § 1396d(r).

37. As defined by the Act, EPSDT also includes diagnosis of any defects and physical and mental illnesses and conditions, and treatment and other measures needed to correct such conditions, whether or not the needed service is otherwise covered by the state. 42 U.S.C. § 1396d(r). In short, the Medicaid Act requires the states to provide Medical Assistance for follow-up services, to ensure that potential problems are diagnosed and treatment is provided promptly.

38. The Act requires not merely that Medical Assistance be furnished; it must be furnished with "reasonable promptness." 42 U.S.C. § 1396a(a)(8).

39. In other words, the Act obligates states to ensure that there are enough doctors and dentists who are willing and qualified to provide children's healthcare services on a timely basis to meet the needs of children who are eligible for and/or enrolled in Medicaid. 42 C.F.R. § 441.61; CMS, State Medicaid Manual § 5220. States must take advantage of all resources available to assure adequate provider participation in Medicaid's children's healthcare services. CMS, State Medicaid Manual § 5220.

40. Defendants publish the rates they offer to reimburse medical and dental providers for the examinations, diagnosis and treatment of children enrolled in Medicaid. These rates vary according to the type of service provided. The rates Defendants offer are extremely low and are at a level that do not attract a sufficient number of doctors and dentists to provide the medical

and dental examinations, diagnosis and treatment to the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs required by law.

41. Because there are an insufficient number of doctors and dentists willing to examine and treat children who are enrolled in Medicaid, the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs are not able to receive the examinations, diagnosis and treatment that they need and to which they are entitled. In some cases, these Medicaid beneficiaries ultimately receive care, but only after an unreasonably long delay that is far longer than the time a child with commercial insurance must wait to see a doctor or a dentist.

42. In short, because Defendants provide reimbursement rates that are so low that an insufficient number of providers are willing to care for children who are enrolled in Medicaid, Defendants are effectively denying the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs the right to Medical Assistance for EPSDT.

43. The “inadequate payments [offered by Defendants] effectively deny [the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs] the right to ‘medical assistance.’” Westside Mothers v. Olszewski, 454 F.3d 532, 541 (6th Cir. 2006).

44. Additionally, the inadequate payments offered by Defendants effectively deny the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs the right to Medical Assistance “with reasonable promptness.”

45. The individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs have not received Medical Assistance for the EPSDT medical and dental examinations, diagnosis and treatment, and/or they have not received Medical Assistance for such services with "reasonable promptness."

46. Defendants have refused or failed to provide Medical Assistance to the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs as required by 42 U.S.C. § 1396a(a)(8) and (a)(10).

47. Congress recognized that if the Act's requirements are to have meaning, eligible children and their guardians must know that they are entitled to Medicaid and specifically to EPSDT. Thus, the Act requires states to inform eligible children and their families "of the availability of [EPSDT] and the need for age-appropriate immunizations against vaccine-preventable diseases." 42 U.S.C. § 1396a(a)(43)(A). This obligation also includes the responsibility to target outreach to certain "at risk" groups, including adolescents, those who have not recently used the Medical Assistance EPSDT program, and children in foster care placement, CMS, State Medicaid Manual § 5121, and the responsibility to effectively inform individuals who are blind, deaf, or cannot read or understand the English language of the availability of children's healthcare services. 42 C.F.R. § 441.56(a).

48. The individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs have not actually received required information about the availability of EPSDT or the need for immunizations, and/or they have not effectively received required information about the availability of EPSDT or the need for immunizations.

49. Defendants have refused or failed to meet their obligations to the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs under 42 U.S.C. § 1396a(a)(43)(A).

50. The Act also requires states to provide for “providing or arranging for the provision of such screening services [the EPSDT examinations about which Defendants are required to inform children and their families] in all cases where they are requested.” 42 U.S.C. § 1396a(a)(43)(B).

51. The individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs have not been provided requested screening services.

52. Defendants have refused or failed to meet their obligations to the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs under 42 U.S.C. § 1396a(a)(43)(B).

53. Finally, the Act requires states to provide for “arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services.” 42 U.S.C. § 1396a(a)(43)(C).

54. The individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs have not been provided corrective treatment for medical or dental conditions discovered during a screening examination.

55. Defendants have refused or failed to meet their obligations to the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs under 42 U.S.C. § 1396a(a)(43)(C).

56. Further, Defendants have a duty to monitor adequately the actions (and inaction) of the MCOs with which Defendants contract to manage the Medicaid program and coordinate the care of Medicaid beneficiaries. 42 U.S.C. § 1396u-2(b)(5) and (c). Defendants are breaching this duty. Defendants' failure to monitor and oversee the MCOs to which Defendants delegated the responsibility to provide Medical Assistance for EPSDT and other services required under federal law effectively denies Plaintiffs the right to Medical Assistance and other services required under federal law.

#### V. CLAIMS FOR RELIEF

##### First Cause of Action

##### Failure to Provide Medical Assistance for EPSDT to all Eligible Children

##### With Reasonable Promptness

##### 42 U.S.C. §§ 1396a(a)(8), (a)(10) and 1396d(a), (r)

57. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 56, as though fully set forth herein.

58. Defendants' acts or omissions are in violation of 42 U.S.C. § 1396a(a)(8) and (a)(10), as defined by 42 U.S.C. § 1396d(a) and (r).

59. Defendants' violation of 42 U.S.C. § 1396a(a)(8) and (a)(10), as defined by 42 U.S.C. § 1396d(a) and 1396d(r), provides a cause of action to Plaintiffs under 42 U.S.C. § 1983, inasmuch as Defendants, under color of state law, custom, or usage, have deprived, are depriving, and will continue to deprive the individual Plaintiffs, the Class, and the Medicaid

beneficiaries represented by the organizational Plaintiffs of their clearly established rights under 42 U.S.C. § 1396a(a)(8) and (a)(10), as defined by 42 U.S.C. § 1396d(a) and (r).

60. Defendants' violation of 42 U.S.C. § 1396a(a)(8) and (a)(10) harms the organizational Plaintiffs in that the violations impose otherwise unnecessary expenditures of organizational resources upon the organizations.

61. Defendants' violation of 42 U.S.C. § 1396a(a)(8) and (a)(10) harms the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs by depriving them of medically necessary care, which in turn results in the needless infliction of pain, the endangerment of young lives, the disruption of learning, development and growth and the stunting of children's chances to achieve their full potential.

62. The harm to the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs is irreparable and the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs have no adequate remedy at law to prevent the continuing wrong and irreparable injury caused by Defendants' acts or omissions.

### Second Cause of Action

#### Denial of Basic Child Healthcare Outreach and Information

#### 42 U.S.C. § 1396a(a)(43)(A)

63. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 62, as though fully set forth herein.

64. Defendants' acts or omissions are in violation of 42 U.S.C. § 1396a(a)(43)(A).

65. The individual Plaintiffs, the Class, and Medicaid beneficiaries represented by the organizational Plaintiffs have not actually received required information about the availability of EPSDT and/or the need for immunizations, and/or they have not effectively received required information about the availability of EPSDT and/or the need for immunizations.

66. Defendants' violation of 42 U.S.C. § 1396a(a)(43)(A) provides a cause of action to Plaintiffs under 42 U.S.C. § 1983, inasmuch as Defendants, under color of state law, custom, or usage, have deprived, are depriving, and will continue to deprive the individual Plaintiffs, the Class and the Medicaid beneficiaries represented by the organizational Plaintiffs of their clearly established rights under 42 U.S.C. § 1396a(a)(43)(A).

67. Defendants' violation of 42 U.S.C. § 1396a(a)(43)(A) harms the organizational plaintiffs in that the violations impose otherwise unnecessary expenditures of organizational resources upon the organizations.

68. Defendants' violation of 42 U.S.C. § 1396a(a)(43)(A) harms the individual Plaintiffs, the Class and the Medicaid beneficiaries represented by the organizational Plaintiffs in that it results in deprivation of medically necessary care, which in turn results in the needless infliction of pain, the endangerment of young lives, the disruption of learning, development and growth and the stunting of children's chances to achieve their full potential.

69. The harm to the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs is irreparable and the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs have no adequate remedy at law to prevent the continuing wrong and irreparable injury caused by Defendants' acts or omissions.



**Third Cause of Action**

**Denial of Requested Screening Services**

**42 U.S.C. § 1396a(a)(43)(B)**

70. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 69, as though fully set forth herein.

71. Defendants' acts or omissions are in violation of 42 U.S.C. § 1396a(a)(43)(B).

72. Defendants' violation of 42 U.S.C. § 1396a(a)(43)(B) provides a cause of action to Plaintiffs under 42 U.S.C. § 1983, inasmuch as Defendants, under color of state law, custom, or usage, have deprived, are depriving, and will continue to deprive the individual Plaintiffs, the Class and the Medicaid beneficiaries represented by the organizational Plaintiffs of their clearly established rights under 42 U.S.C. § 1396a(a)(43)(B).

73. Defendants' violation of 42 U.S.C. § 1396a(a)(43)(B) harms the organizational plaintiffs in that the violations impose otherwise unnecessary expenditures of organizational resources upon the organizations.

74. Defendants' violation of 42 U.S.C. § 1396a(a)(43)(B) harms the individual Plaintiffs, the Class and the Medicaid beneficiaries represented by the organizational Plaintiffs by depriving them of medically necessary care, which in turn results in the needless infliction of pain, the endangerment of young lives, the disruption of learning, development and growth and the stunting of children's chances to achieve their full potential.

75. The injury to the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs is irreparable and the individual Plaintiffs, the Class,

and the Medicaid beneficiaries represented by the organizational Plaintiffs have no adequate remedy at law to prevent the continuing wrong and irreparable injury caused by Defendants' acts or omissions.

**Fourth Cause of Action**

**Denial of Corrective Treatment**

**42 U.S.C. § 1396a(a)(43)(C)**

76. Plaintiffs incorporate the allegations set forth in paragraphs 1 through 75, as though fully set forth herein.

77. Defendants' acts or omissions are in violation of 42 U.S.C. § 1396a(a)(43)(C).

78. Defendants' violation of 42 U.S.C. § 1396a(a)(43)(C) provides a cause of action to Plaintiffs under 42 U.S.C. § 1983, inasmuch as Defendants, under color of state law, custom, or usage, have deprived, are depriving, and will continue to deprive the individual Plaintiffs, the Class and the Medicaid beneficiaries represented by the organizational Plaintiffs of their clearly established rights under 42 U.S.C. § 1396a(a)(43)(C).

79. Defendants' violation of 42 U.S.C. § 1396a(a)(43)(C) harms the organizational plaintiffs in that the violations impose otherwise unnecessary expenditures of organizational resources upon the organizations.

80. Defendants' violation of 42 U.S.C. § 1396a(a)(43)(C) harms the individual Plaintiffs, the Class and the Medicaid beneficiaries represented by the organizational Plaintiffs by depriving them of medically necessary care, which in turn results in the needless infliction of

pain, the endangerment of young lives, the disruption of learning, development and growth and the stunting of children's chances to achieve their full potential.

81. The injury to the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs is irreparable and the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs have no adequate remedy at law to prevent the continuing wrong and irreparable injury caused by Defendants' acts or omissions.

## VI. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, respectfully request that this Court grant the following relief:

1. Assert jurisdiction over this action.
2. Certify this action as a class action pursuant to FED. R. CIV. P. 23 on behalf of the class defined above.
3. Grant declaratory relief pursuant to FED. R. CIV. P. 57, declaring unlawful Defendants' policy and practice of denying the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs the Medical Assistance for EPSDT and other services to which they are entitled under the laws cited herein.
4. Issue injunctive relief pursuant to FED. R. CIV. P. 65, prohibiting Defendants from violating the rights of the individual Plaintiffs, the Class, and the Medicaid beneficiaries represented by the organizational Plaintiffs as complained of herein and requiring them to take such actions as are necessary to remedy their past violations.

5. Appoint a Special Master pursuant to FED. R. CIV. P. 53 to oversee Defendants' compliance with the Court's orders.
6. Award Plaintiffs reasonable attorneys' fees and costs, as authorized by 42 U.S.C. § 1988 and 28 U.S.C. § 1920.
7. Grant such other relief as may be deemed proper by the Court.

Dated: October 11, 2006

By: /s/ Richard L. Berkman

*Of Counsel:*  
Jane Perkins  
NATIONAL HEALTH LAW  
PROGRAM  
211 N. Columbia Street  
Chapel Hill, NC 27514  
(919) 968-6308

Richard L. Berkman  
DECHERT LLP  
Cira Centre, 2929 Arch Street  
Philadelphia, PA 19104-2808  
(215) 994-2684

Marilyn Mullane  
MICHIGAN LEGAL SERVICES  
900 Michigan Building  
220 Bagley Street  
Detroit, MI 48226  
(313) 964-4130

Susan McParland  
MICHIGAN ASSOCIATION  
FOR CHILDREN WITH  
EMOTIONAL DISORDERS  
30233 Southfield Road, Suite 219  
Southfield, MI 48076  
(248) 433-2200

Jennifer R. Clarke  
PUBLIC INTEREST  
LAW CENTER  
OF PHILADELPHIA  
125 South 9th Street, Suite 700  
Philadelphia, PA 19107  
(215) 627-7100

**CERTIFICATE OF SERVICE**

I, Richard L. Berkman, hereby certify that, on October 11, 2006, I filed a true and correct copy of the foregoing Second Amended Complaint electronically and it is available for viewing and downloading from the ECF system. This document was served electronically on the following:

**Luttrell D. Levingston**

MI Department of Attorney General (Detroit)  
3030 W. Grand Boulevard  
Suite 10-200  
Detroit, MI 48202  
313-456-0280  
levingstonl@michigan.gov

**Morris J. Klau**

MI Department of Attorney General (Detroit)  
3030 W. Grand Boulevard  
Suite 10-200  
Detroit, MI 48202  
313-456-0281  
klaum@michigan.gov

/s/ Richard L. Berkman  
Richard L. Berkman